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In the
Supreme Court of the United States

October Term, 1980

No. 79-1647

FRANK KOWALIK, JR. and KAREN KOWALIK,
Petitioners,

vs.
UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service,
Respondent

with DENNIS FAHEY, District Manager, World Savings and Loan,
Respondent @..... **No. 79-1356**

and with
TRUDY HAUGSNESS, Vice President, Columbia Savings and Loan,
Respondent @..... **No. 79-1357**

and with
CLARENCE JOHNSON, Auditor, Central Bank and Trust,
Respondent @..... **No. 79-1358**

and with
INCOME REALTY and BILL RILEY, President
Respondents @..... **No. 79-1360**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered on January 9, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit is Slip Opinion No's: 79-1357, 79-1358, and 79-1360 (treated as companion cases) and is set out in Appendix A infra @ p. 9. The decisions of the United States District Court for the District of Colorado are No. 79-W-49 which is set out in Appendix B infra, @ p. 12, No. 79-W-50 which is set out in Appendix B-1 infra @ p. 14, No. 79-W-51 which is set out in Appendix B-2 infra @ p. 16 and No. 79-W-130 which is set out in Appendix B-3 infra @ p. 18.

JURISDICTION

The Judgment of the Tenth Circuit was entered on January 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1651(a).

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioners have been effectively denied their rights under the United States Constitution when the Federal Government, acting through the Internal Revenue Service, is permitted to investigate criminal matters under the guise of civil proceedings which are not subject to Constitutional protections?

Whether any judicial proceeding has validity if it permits the government to act against its citizens without recognizing and upholding the contractual guarantees clearly set out in the United States Constitution?

Has due process been achieved when Petitioners have been consistently denied oral argument at all levels after respondents have evaded issues specifically raised by petitioners?

STATEMENT OF THE CASE

The Petitioners here were respondents by intervention originally in each of the four (4) cases here presented as companion cases.

The Court of Appeals for the Tenth Circuit treated them as companion cases, issuing one opinion, see infra Appendix A.

The United States District Court for the District of Colorado issued an opinion covering each case, see infra Appendix B, Appendix B-1, Appendix B-2, and Appendix B-3.

In each of the four cases the I.R.S. sought to examine the records of each first named respondent as they related to the financial transaction of the Petitioners, to-wit:

— World Savings and Loan — Savings accounts
— Columbia Savings and Loans — Savings account
— Central Bank and Trust — Savings account
— Income Realty and Bill Riley — Employment *vel non*

Questions were raised at various times as to whether the "third-party record-keeper" rules, requirements and privileges applied. Issues were also raised as to the power of the Court to act where the government is moving against a citizen in a civil action wherein the citizen has no Constitutional protections.

Clearly evident throughout was the desire of the I.R.S. to examine the financial records relating to Petitioners, who were adamant that such viewing not be permitted. The institutional respondents were, mostly, *pro forma* in their responses.

The I.R.S. maintained that, by its meticulous compliance with all or pertinent parts of 26 U.S.C. Sections 7602, 7604, 7609, and 7402, it was entitled to proceed as desired.

The Petitioners contested the alleged compliance with statutory requirements and objected further on fundamental issues as to jurisdiction and constitutionality.

The I.R.S. prevailed at all levels of contest with Petitioner carrying the Appeal.

REASONS FOR GRANTING THE WRIT

I

THE ACTION BELOW DENIES PETITIONERS THEIR RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

When taxpayer intervenes as he is permitted by 26 U.S.C. Sec. 7609, he, being the true party-in-interest, should be able to control the treatment of information concerning his income.

He is the party who by his actions, created the records that are sought. He can and must assert his Constitutional rights at his first opportunity or will be deemed to have waived them. *U.S. v. Sullivan,* 274 U.S. 259.

Yet the decisions of the lower Courts sanction a procedure that effectively extinguishes a clearly stated right under the Constitution of the United States, to-wit:

> ". . . . No person shall be compelled in any criminal case to be a witness against himself. . . ."
> *5th Amendment, United States Constitution.*

Thus the I.R.S. is permitted to achieve criminal ends under the guise of civil process.

The lower Court is content to accept "a prima facia case that the issuance of these summonses (sic) was in furtherance of a valid civil tax determination purpose", Appendix A p. 9, without any requirement that the Constitutional rights of the taxpayer be preserved intact.

Allowing "the government" to proceed in a manner that precludes the citizen from asserting or claiming his Constitutional rights at the proper time permits "the government" to

effectively deny the citizen those Constitutional rights. The Courts are quick to find "a waiver" of any right not timely asserted. *United States v. Sullivan,* 274 U.S. 259.

II

THERE IS DENIAL OF DUE PROCESS WHEN A CITIZEN IS NOT HEARD BY THE JUDICIAL PROCESS

Petitioners were not heard (by oral argument) at the District Court level as the record will show. They were similarly denied an oral argument by the Tenth Circuit, see Appendix A infra.

It would seem, by definition, that due process cannot be claimed if the supplicant is not heard. The reliance on written material does not fully answer the "desire to be heard", nor were the issues addressed in the responses by the I.R.S. Any expert on human nature will opine that some individuals are more convincing and persuasive in the "give and take" of oral argument that was denied Petitioners at all levels.

III

THE CONSTITUTION OF THE UNITED STATES IS, AND WAS INTENDED TO BE, A CONTRACT BETWEEN THE CITIZEN AND HIS GOVERNMENT

No action taken by the government of the United States can be valid if it does not carefully and faithfully follow the contract by which it came into being. The citizen granted this contract to a government entity with limited and separate powers. The contract permits the government to act against the citizen *only* in criminal actions; piracy, counterfeiting and treason.

Civil Courts are established for the adjudication of controversies between subject and subject (citizen vs. citizen) or the ascertainment, enforcement and redress of *private rights.*

Criminal Courts are established for the adjudication of controversies between the state (federal Government) and subject, (entity vs. citizen) for the ascertainment and redress of a breach of the *public right* and of duties due the whole community in its social and aggregate capacity.

The contention by the Internal Revenue Service that the statutes are both civil and criminal is totally at variance with the Constitutional mandate for a clear separation of powers. That mandate was intended to prevent the result which obtains here, to-wit: the judicial branch being used as an enforcement tool of the executive branch in performing powers delegated from the legislative, i.e., the collection of taxes. It would seem, therefore, that the federal government cannot have "Quasi" civil/criminal actions in any court.

All actions in this matter are adversary, government vs. citizen, yet, they were characterized as civil and justified by that characterization.

That action is a total nullity because the government has not such power:

> "The general rule is that an unconstitutional statute though having the form and name of law, is in reality no law, but is wholly void and ineffective for any purpose; since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted."
>
> ". . . . Since an unconstitutional law is void, the general principle follows that it imposes no duties, confers no rights, creates no office, bestows no power of authority on anyone, affords no protection and justifies no acts performed under it . . . ."
>
> "No one is bound to obey an unconstitutional law and no courts are bound to enforce." *16 AJ 2nd Sec. 177*

IV

AN ACT OF CONGRESS WHICH IS NOT MADE PURSUANT TO THE CONSTITUTION IS, AND SHOULD BE DECLARED, UNCONSTITUTIONAL

The Courts have the power and the duty to nullify those laws which do not support or which nullify the Constitution of the United States. *Marbury v. Madison,* 5 U.S. 137, 2 L.Ed. 60: (1803)

> @*p. 176* ". . . the powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten, the constitution is written. . ."
> ". . . the distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed. . ."
>
> @*p. 177* ". . . it is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it. . ."
> ". . . Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void."
>
> @*p. 180* ". . . It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made pursuance of the Constitution, have that rank.
>
> Thus the particular phraseology of the Constitution (of the United States) confirms and strengthens the principle, supposed to be essential

> to all written constitutions, that a law repugnant to the Constitution is void; and that Courts, as well as other departments, are bound by that instrument. . ."

and from *Miranda v. Arizona*, 380 U.S. 436 (1966):

> ". . . Where rights secured by the Constitution of the United States are involved there can be no rule-making or legislation which would abrogate them. . ."

see also *Boyd v. U.S.*, 116 U.S. 616 (1885) @ 635:

> ". . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, against stealthy encroachment thereon. . ."

It is submitted that the tenor of the language above should evoke a search for construction and language to help the citizen rather than the constant effort to uphold "the government" who is the servant, not the master of the individual citizen.

CONCLUSION

For the reasons set forth herein, the Petitioners respectfully pray that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted;

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APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service, *Petitioners-Appellees,*	)	
v.	)	No. 79-1356
DENNIS FAHEY, District Manager, World Savings and Loan, *Respondent,*	)	
FRANK KOWALIK, JR. and KAREN KOWALIK, *Intervenors-Appellants.*	)	
UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service, *Petitioners-Appellees,*	)	
v.	)	No. 79-1357
TRUDY HAUGSNESS, Vice President, Columbia Savings and Loan, *Respondent,*	)	
FRANK KOWALIK, JR. and KAREN KOWALIK, *Intervenors-Appellants.*	)	

UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service, *Petitioners-Appellees,*	)	
v.	)	No. 79-1358
CLARENCE JOHNSON, Auditor, Central Bank and Trust, *Respondent,*	)	
FRANK KOWALIK, JR. and KAREN KOWALIK, *Intervenors-Appellants.*	)	
UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service, *Petitioners-Appellees,*	)	
v.	)	No. 79-1360
INCOME REALTY and BILL RILEY, President, *Respondents,*	)	
FRANK KOWALIK, JR. and KAREN KOWALIK, *Intervenors-Appellants.*	)	

Appeals from the United States District Court
For the District of Colorado
(Civ. Nos. 79-W-49, 79-W-50, 79-W-51, 79-W-130)

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *SEE* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). Appellants' motion to transfer these cases from Calendar D to Calendar B is denied and the causes are therefore ordered submitted without oral argument.

These are appeals from orders of the district court directing enforcement of four summonses issued to third parties by the Internal Revenue Service. The taxpayers instructed the third party defendants to disregard the summonses and intervened in the suits.

The taxpayers argue first that the United States Government is without authority under the constitution to bring civil actions against citizens, and that the court therefore lacks jurisdiction to enforce these IRS summonses. This argument, though creative, is frivolous.

The taxpayers' brief also suggests that the IRS is actually achieving criminal ends in this investigation under the guise of civil processes. This contention also lacks merit. The government established a *prima facie* case that the issuance of these summonses was in furtherance of a valid civil tax determination purpose. The taxpayers offered no proof in contradiction. *See United States v. MacKay*, No. 79-1243, at 6 (10th Cir. Oct. 30, 1979).

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service,	)	
Petitioners,	)	Civil Action
v.	)	No. 79-W-49
	)	**ORDER**
DENNIS FAHEY, District Manager, WORLD SAVINGS AND LOAN,	)	
Respondent.	)	

This matter coming before the Court upon petition of the United States of America and Kenneth Batson for enforcement of an Internal Revenue Service summons; and

The Court having received a Notice of Intervention and Motion to Dismiss for Lack of Jurisdiction from the taxpayers, Frank Kowalik, Jr. and Karen Kowalik; and the Court having received a response from the respondent stating that he has no reason not to comply with the summons issued, it is hereby

ORDERED that the taxpayers Notice of Intervention is granted; and it is

FURTHER ORDERED that the taxpayers Motion to Dismiss for Lack of Jurisdiction is denied; and it is

FURTHER ORDERED that petitioner Kenneth Batson shall appear at the offices of the respondent, Dennis Fahey, District Manager, World Savings and Loan, and obtain the information sought under the summons; and it is

FURTHER ORDERED that if the taxpayers Frank Kowalik, Jr. and Karen Kowalik file a Notice of Appeal within

ten (10) days from the date of this Order, this Order is stayed until the Tenth Circuit Court of Appeals has acted on the case of *United States, et al. v. Income Realty, et al.*, C.A. #78-2032.

DATED this 16th day of March, 1979.

BY THE COURT:

FRED M. WINNER
United States District Judge

"NOTE: This Order is to be mailed by movant to all counsel and pro se litigants. Certificate of Mailing is to be filed with the Clerk of the Court within three days."

APPENDIX "B-1"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service,	)	
Petitioners,	)	Civil Action No. 79-W-50
v.	)	**ORDER**
TRUDY HAUGSNESS, Vice President, COLUMBIA SAVINGS AND LOAN,	)	
Respondent.	)	

This matter coming before the Court upon petition of the United States of America and Kenneth Batson for enforcement of an Internal Revenue Service summons; and

The Court having received a Notice of Intervention and Motion to Dismiss for Lack of Jurisdiction from the taxpayers, Frank Kowalik, Jr. and Karen Kowalik; and the Court having received a response from the respondent stating that she has no reason not to comply with the summons issued; it is hereby

ORDERED that the taxpayers Notice of Intervention is granted; and it is

FURTHER ORDERED that the taxpayers Motion to Dismiss for Lack of Jurisdiction is denied; and it is

FURTHER ORDERED that petitioner Kenneth Batson shall appear at the offices of the respondent, Trudy Haugsness, Vice President, Columbia Savings and Loan, and obtain the information sought under the summons; and it is

FURTHER ORDERED that if the taxpayers Frank Kowalik, Jr. and Karen Kowalik file a Notice of Appeal within ten (10) days from the date of this Order, this Order is stayed until the Tenth Circuit Court of Appeals has acted on the case of *United States, et al. v. Income Realty, et al.*, C.A. #78-2032.

DATED this 16th day of March, 1979.

BY THE COURT:

FRED M. WINNER
United Stated District Judge

"NOTE: This Order is to be mailed by movant to all counsel and pro se litigants. Certificate of Mailing is to be filed with the Clerk of the Court within three days."

APPENDIX "B-2"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and KENNETH BATSON, Special Agent of the Internal Revenue Service,	)	
Petitioners,	)	Civil Action No. 79-W-51
v.	)	**ORDER**
CLARENCE JOHNSON, Auditor, CENTRAL BANK AND TRUST,	)	
Respondent.	)	

This matter coming before the Court upon petition of the United States of America and Kenneth Batson for enforcement of an Internal Revenue Service summons; and

The Court having received a Notice of Intervention and Motion to Dismiss for Lack of Jurisdiction from the taxpayers, Frank Kowalki, Jr. and Karen Kowalik; it is hereby

ORDERED that the taxpayers Notice of Intervention is granted; and it is

FURTHER ORDERED that the taxpayers Motion to Dismiss for Lack of Jurisdiction is denied; and it is

FURTHER ORDERED that petitioner Kenneth Batson shall appear at the offices of the respondent Clarence Johnson, Auditor, Central Bank and Trust, and obtain the information sought under the summons; and it is

FURTHER ORDERED that if the taxpayers Frank Kowalik, Jr. and Karen Kowalik file a Notice of Appeal within

ten (10) days from the date of this Order, this Order is stayed until the Tenth Circuit Court of Appeals has acted on the case of *United States, et al. v. Income Realty, et al.*, C.A. #78-2032.

DATED this 16th day of March, 1979.

BY THE COURT:

FRED M. WINNER
United States District Judge

"NOTE: This Order is to be mailed by movant to all counsel and pro se litigants. Certificate of Mailing is to be filed with the Clerk of the Court within three days."

APPENDIX "B-3"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, and KENNETH BATSON, Special Agent of the Internal Revenue Service, *Petitioners,*	)	Civil Action No. 79-W-130
v.	)	**O R D E R**
INCOME REALTY; BILL RILEY, President, *Respondent.*	)	

This matter coming before the Court upon petition of the United States of America and Kenneth Batson for enforcement of an Internal Revenue Service summons; and

The Court having received a Motion to Intervene and Motion to Dismiss for Lack of Jurisdiction from the taxpayers, Frank Kowalik, Jr. and Karen Kowalik; and the Court having received a response from the respondent stating that he has no reason not to comply with the summons issued; and

Counsel for the respondent and the taxpayers having appeared at the hearing on this matter, it is hereby

ORDERED that the taxpayers' Motion to Intervene is granted; and it is

FURTHER ORDERED that the taxpayers' Motion to Dismiss for Lack of Jurisdiction is denied; and it is

FURTHER ORDERED that the petitioner Kenneth Batson shall appear at the offices of the respondent Income Realty, Bill Riley, President, and obtain the information sought under the summons; and it is

FURTHER ORDERED that in the event the taxpayers Frank Kowalik, Jr. and Karen Kowalik file a Notice of Appeal within 10 days from the date of this Order, this Order is stayed until the Tenth Circuit Court of Appeals has acted on the case of *United States, et al. v. Income Realty, et al.*, C.A. #78-2032.

DATED this 5th day of April, 1979.

BY THE COURT:
FRED M. WINNER
United States District Judge